

Online Research @ Cardiff

This is an Open Access document downloaded from ORCA, Cardiff University's institutional repository: <https://orca.cardiff.ac.uk/id/eprint/126266/>

This is the author's version of a work that was submitted to / accepted for publication.

Citation for final published version:

Field, Stewart ORCID: <https://orcid.org/0000-0003-3963-8346> 2019.
Explaining, interpreting, and prescribing: some tensions and dilemmas in the comparative analysis of youth justice cultures. *Journal of Law and Society* 46 (S1) , S51-S72. 10.1111/jols.12183 file

Publishers page: <http://dx.doi.org/10.1111/jols.12183>
<<http://dx.doi.org/10.1111/jols.12183>>

Please note:

Changes made as a result of publishing processes such as copy-editing, formatting and page numbers may not be reflected in this version. For the definitive version of this publication, please refer to the published source. You are advised to consult the publisher's version if you wish to cite this paper.

This version is being made available in accordance with publisher policies.

See

<http://orca.cf.ac.uk/policies.html> for usage policies. Copyright and moral rights for publications made available in ORCA are retained by the copyright holders.



Explaining, interpreting, and prescribing: some tensions and dilemmas in the comparative analysis of youth justice cultures

Stewart Field

ABSTRACT

This chapter reflects on the implications of a cross-cultural empirical research study on youth justice in Italy and Wales for transnational prescription of good practice. It examines the challenges in doing comparative studies which isolate the influence of particular elements of criminal justice regimes. Such analysis may seem well suited to transnational policy prescription in that particular elements are more easily transposed than whole systems. But institutional categories and practice may be so culturally imbedded that it becomes very difficult to understand their influence outside those particular cultural contexts. The article goes on to examine the potential (and the limitations) for transnational policy prescription of more holistic interpretive approaches to explanation rooted in analysis of legal cultures. It concludes that such approaches can expand the range of possible policy choices in terms of transnational prescription but cannot offer a means to predict their precise effects.

INTRODUCTION

Comparative research often identifies and highlights cross-cultural diversity in social and legal practices and norms. It is that very diversity that often seems to open up the possibility of doing things differently. But if the way we think and act in matters of security and justice is defined by varying local cultures, then this may raise questions about the feasibility of effective transfer out of a specific cultural context and even perhaps its desirability. This article reflects on the experience of conducting an empirical research study which, relying on interviews and matched case-file samples, sought to compare youth justice practice in Wales (specifically South Wales) and Italy (with a focus on Emilia Romagna).¹ It

¹ The study was led by myself and Professor David Nelken and funded by the Economic and Social Research Council in the United Kingdom (Reference number R000239418) and by the Ministry for the Universities in Italy.

argues that our capacity to evaluate and prescribe policy and practice cross-culturally on the basis of comparative studies is influenced by the research strategies and methods adopted. In particular, it examines the challenges, difficulties and implications of two different ways of approaching such research: first, a conventional social science research strategy seeking to explain difference by isolating key variables for comparison and secondly, a more holistic interpretive approach organised around the concept of legal cultures.

The argument proceeds in four steps. First, some preliminary remarks about the relationship between purposes, methods and concepts in cross-cultural research which draw on arguments first made by my co-researcher Professor David Nelken. Secondly, an outline of how we constructed the study. This emphasizes the difficulties of finding valid cross-cultural anchoring points on which to pin an analysis of particular elements and variables within each system as might be required by more traditional positivist social science approaches. Thirdly, an explanation of the interpretive cultural approach that we adopted with its insights and the limits to those insights. Lastly, an exploration of the implications for cross-cultural evaluation and policy prescription.

PURPOSES, METHODS AND CONCEPTS IN COMPARATIVE CRIMINAL JUSTICE

David Nelken has argued the need for more explicit examination of the significance of the different underlying objectives of comparative research.² In particular, he has called for examination of how different purposes impact on the way that comparative research is conducted, how data is interpreted and presented and (policy) conclusions are drawn or not drawn. He identifies five such purposes: describing, classifying, explaining, interpreting and evaluating.³ In this article, I want to focus on the interrelationship between explaining and interpreting and their implications for evaluation. Nelken distinguishes explanations constructed in terms of causal relations between discrete objective factors and those constructed as holistic interpretive accounts.⁴ The former (associated with a certain traditional social science often termed positivist) seeks to formulate and test explanatory hypotheses about causal relationships that will hold good across cultures and social contexts. For example, one might make an attempt to establish generalizable propositions that are valid

² D Nelken, *Comparative criminal justice: making sense of difference* (2010)

³ *Id.*, *passim* but especially chapter 1

⁴ *Id.*, chapter 3

across jurisdictions about the consequences of earlier or later intervention in youth justice. Once causal variables shaping the consequences of interventions have been identified, one can predict their effect in specified circumstances. This seems to offer the prospect of establishing 'scientific' propositions and 'scientific' truths about 'what works' and thus a direct and clear route from comparative explanation to transnational prescription. But Nelken points out such studies require 'some sort of common denominator of meaning'⁵ for the key dependent variables (such as youth crime rates, penal intervention, conviction or diversion, custody rates). It is these very questions of cultural meaning which become the central concern of comparative research in which interpretation is the key research strategy. The challenge here is to understand the interrelationship between explaining and interpreting as strategies for comparative research that might inform cross-cultural policy prescription. What if one consequence of a deeper and deeper concern for meaning and interpretation in cross-cultural research is that many categories of different criminal justice systems that seem superficially comparable become less so? The 'risk' (in one sense) is that the deeper one explores what categories mean to the actors involved, the greater the opportunity to identify hidden cultural specificities and thus cross-cultural differences in meaning. That might make the use of traditional positivistic social science approaches problematic in circumstances where – on the basis of limited cross-cultural interpretive understanding – they may originally have seemed viable.

CONSTRUCTING A CASE-STUDY: COMPARATORS AND RESEARCH QUESTIONS

In the late 1990s and early 2000s, David Nelken and I conducted empirical research which compared youth justice in Wales and Italy. We constructed matched samples of case-files drawn from South Wales and Emilia Romagna and supplemented these with interviews done in South Wales and Italy of youth justice practitioners (social workers, magistrates and police).⁶ Our decision to compare and our choice of comparator was

⁵ *Id.*, 42

⁶ The interviews were semi-structured and in part informed by discussion of matched vignettes of hypothetical cases. For a full exposition of methods and conclusions see S Field and D Nelken (2007) 'Early Intervention and the Cultures of Youth Justice: A Comparison of Italy and Wales' in (eds) V Gessner and D Nelken, *European Ways of Law*, S Field and D Nelken 'Reading and writing youth justice in Italy and (England and) Wales' (2010) 12 *Punishment and Society* 287, S Field 'Finding or Imposing Coherence? Comparing national cultures of youth justice' (2010) 5 *Journal of Comparative Law*,

primarily driven by intellectual curiosity about profound difference: at the time, Italy and England and Wales seemed to going off in radically different directions in their approach to the role of state intervention through the criminal process as a response to youth offending. The British Government approach to youth justice had shifted in the early 1990s away from the practice of limited intervention that had developed since the 1970s. This reversal of policy was entrenched and refined by the Crime and Disorder Act 1998. This introduced what became known as the 'new' youth justice, overtly based on a strategy of early and progressive state intervention through the criminal justice system.⁷ The reform involved limiting the use of informal and formal warnings in relation to any one individual. A presumption based on a three-step model was introduced: normally a first offence admitted by the young person would be treated with an official police reprimand. A second offence would usually be met by a police Final Warning, with the possibility in some cases that this might involve some (formally voluntary) social intervention. But a third offence, where the offender has already received a reprimand and Final Warning, would normally be met with prosecution and an appearance before the Youth Court. The underpinning rationale was that conviction and punishment by the state was a key element in 'responsibilizing' young people.⁸ In sharp contrast, a revision in 1988 of its Code of Juvenile Justice had explicitly entrenched into the Italian legal fabric assumptions about the need to limit as much as possible the use of punishment. The aims of reform were a little more diverse than that: they embraced a concern to promote responsabilization through education where necessary. But central importance was placed on the need to limit the stigma associated with conviction (and especially custody) and on not impeding the normal process of growing up (primarily shaped by community and family).⁹ Professional youth justice magistrates in the pre-trial process made extensive use of diversionary filters which meant that most young people left the system without conviction or with a judicial pardon. These differences in approach between England and

Special Issue on Legal Culture, 216, reprinted in (ed) D Nelken *Using legal culture* (2012) 306.

⁷ For good accounts of the 'new' youth justice in historical context, see R Smith, *Youth Justice: Ideas, Policy, Practice* (2014, 3rd edn.) ch. 1-3 and DJ Smith (ed.), *A New Response to Youth Crime* (2010). For an empirical account of the practice cultures of the new youth justice, see S Field 'Practice Cultures and the 'New' Youth Justice in (England and) Wales' (2007) 47 *British Journal of Criminology* 311

⁸ Home Office (1997) *No More Excuses* Cmnd. 3809

⁹ U Gatti and A Verde, *Juvenile Justice in Italy* (2016) Oxford Handbooks Online, pp. 5, 22, <https://www.oxfordhandbooks.com/abstract/10.1093/oxfordhb/9780199935383.001.0001/oxfordhb-9780199935383-e-66?rskey=2TLZkQ>, Field, *op. cit.* (2012) n 6, pp. 314-5.

Wales and Italy seemed to be reflected in very profound differences in proportionate use of diversion, conviction and custody. Thus in Italy the ratio of young people coming into the youth justice system who were dealt with without conviction or by a simple pardon was about 80:20 in favour of diversion while during much of the 2000s the equivalent figure in England and Wales was more like 40:60.¹⁰ In the mid to late 2000s, the custody rate for 12-17 year olds in Italy was under 15 per 100,000 while it was over 70 in England and Wales.¹¹

Our 'intellectual curiosity' about these profound differences was of course informed by evaluative and prescriptive considerations. As we constructed the study the 'new' youth justice in England and Wales was being subject to strong critique from academics concerned that it would lead to excessive, punitive and socially excluding state intervention.¹² A number of British academics and third sector actors have pointed to Italy as a more tolerant alternative.¹³ I will return to these prescriptive questions in the conclusion after considering some of the issues raised by the study itself.

We started with two very broad but simple research questions. First, did the published national and international statistics mean what they seemed to mean – that penal response to juvenile offending was systematically more interventionist and punitive in England and Wales than in Italy? Secondly, if it was, what were the legal and social factors that permitted, encouraged and facilitated such difference? It became quickly clear that it would be difficult to conduct comparative quantitative analysis of relevant variables using published national or international data. Even answering the most basic question – how much intervention is going on in each system – was rendered problematic by a lack of comparable categories for measuring intervention. Comparative data

¹⁰ For Italy see U Gatti and A Verde, 'Comparative Juvenile Justice: an overview on Italy' in *Juvenile Justice Systems: International Perspectives*, ed. J. Winterdyk (2002) 312. For England and Wales see <http://www.justice.gov.uk/downloads/statistics/youth-justice/yjb-annual-workload-data>. For comparative international data, the details of which for various reasons must be looked at with some scepticism, but which suggest very substantial differences in diversion and conviction rates, see S Malby 'Juvenile Justice and the United Nations Survey on Crime Trends and Criminal Justice Systems' in *Crime and Criminal Justice Systems in Europe and North America 1995-2004*, eds K. Aromaa and M. Heiskanen 127-132.

¹¹ See Field and Nelken, op.cit. (2007), n. 7, 349 for details of these calculations. There are international comparisons based on slightly different categorisations but with the same broad conclusions in N Hazell, *Cross-national comparisons of youth justice* (2008), Table 8.1 and Malby, op.cit., n 10, Table 6.6.

¹² See for example, J Pitts 'The New Youth Justice and the Politics of Electoral Anxiety' in *The New Youth Justice*, ed. B Goldson (2000).

¹³ For discussion, see D Nelken 'Understanding and learning from other systems of juvenile justice in Europe' in *Juvenile Justice in Europe* ed. B Goldson (2019).

could be drawn from UN Surveys since the 1980s on trends in crime and criminal justice. Italy and England and Wales have both participated in some of the sweeps.¹⁴ But aside from banal difficulties – they have not always participated in the same year – there were more important differences. The category for measuring intervention used in the UN data was ‘juveniles brought into formal contact with the police and/or criminal justice systems per 100,000 young people’. This is a rather vague category that might be subject to varying interpretations by different jurisdictions providing data. For example, the counting of offences and offenders in Italy is built on the category ‘offences or offenders notified to the Public Prosecutor’, whereas in England and Wales data is collected in three different forms (police recorded crime data, Judicial Statistics (court data) and Youth Justice Board data). None of these correspond to the Italian measurement. Why? In part because notification of offences by the police to public prosecutors is a key symbolic cultural moment in Italy because it is a jurisdiction founded on the inquisitorial tradition of supervision of police by prosecuting magistrates. There is no such tradition or reporting practice in England and Wales where local political sensitivities about the dangers of a police controlled by the executive meant that the institution of Public Prosecutor developed much later and without a direct hierarchical relationship between the two.¹⁵ We rediscovered the truism that the data that is collected by the state and how it is categorised is shaped by distinct cultural frames of reference (including institutional differences). The dramatic levels of disparity between England and Wales and Italy were unlikely to be wholly the product of differing ways of measuring contact with the system, but the differences in official categories made precise comparisons problematic.

That suggested that we needed to construct our own comparable samples from both jurisdictions in order to examine possible differences in state responses. We constructed a closed case-file sample from South Wales to provide a reasonable match with one already existing from Emilia Romagna in Italy. The Italian sample was not a random sample of all cases coming into the system but of particular types of disposal: half were convictions and the other half examples of the three main diversionary filters in the Italian system.¹⁶ We collected data on key

¹⁴ K Aromaa and M Heiskanen (eds) *Crime and Criminal Justice Systems in Europe and North America 1995-2004* (2008).

¹⁵ C Brants and A Ringnalda, *Issues of Convergence: Inquisitorial Prosecution in England and Wales?* (2010) 32 *et seq.*

¹⁶ There were 150 Italian cases, 75 of which ended in conviction and 75 of which ended in the application of a ‘diversionary filter.’ There were three such filters and we had a sample of 25 case-files for each of them.

variables¹⁷ and made summaries of the case assessments by magistrates and social workers. In South Wales we sought to match the existing Italian sample, by taking random samples of cases dealt with by each of the major forms of disposal in England and Wales: both disposals by different sentences and diversionary filters.¹⁸ So we used the types of legal disposal recognized by each system as the categories organizing our case-file collection (seeking to get random samples of each).

SEARCHING FOR COMMON DENOMINATORS OF MEANING

Using categories of domestic law to organize our case-file collection had a significant impact on subsequent analysis in that the search for a 'common denominator of meaning' remained challenging. We wanted to compare the propensity of the two systems to do three things: to divert young people away from criminal justice, to socially intervene through criminal process in the community and to imprison. Take the middle category, social intervention through criminal process. What kinds of cases under the two systems should be examined as examples of this kind of intervention? In England and Wales, over the relevant period, any significant social intervention that took place would usually occur through post-conviction sentences: at the time of case-file collection in 2003, this was done through a range of different penal orders with different types of intervention with a range of purposes.¹⁹ But substantial community social intervention primarily occurs in the Italian system through a diversionary filter known as *messa alla prova* (literally 'putting to the test'). At a preliminary hearing (usually) or a final hearing (occasionally) the Youth Court may decide to suspend the criminal prosecution for a period of supervision by social workers to take place. During this period the young person is expected to undergo education or training, follow voluntary or activity programmes and accept restrictions such as staying in at night or avoiding certain places. If the period is designated as successfully

¹⁷ Type and circumstances of offence, the offender's personal and family background and previous record

¹⁸ We sampled 15 of each of the main sentence disposals and 25 of each of the main diversionary filters in England and Wales. At the time these were NFAs (where no further action is taken), reprimands and final warnings. This produced 235 cases for which similar data to that existing from Italy was collected.

¹⁹ The generic term 'community order' was used before 2009 to refer to a range of types of social intervention, some broadly rehabilitative in their aspirations (action plan orders, supervision orders, community rehabilitation orders), some mainly incapacitative or punitive (curfew and exclusion orders or community punishment orders) and others mixed in their aspirations (attendance centre orders, community punishment and rehabilitation orders). In 2009, these orders were replaced by a Youth Rehabilitation Order with different requirements corresponding to those interventions.

completed – and it may last up to three years in the most serious cases²⁰ – magistrates will end the prosecution without conviction (and they usually do). So the main instrument for social intervention through the criminal justice system is ‘diversionary’ in the sense that the young person almost always leaves the system without conviction. There is hardly any post-conviction social intervention in the Italian youth justice system. This is largely because delay is an established element of its legal culture.²¹ Youth justice magistrates cited in interview 2-3 years as the normal time period between offence and public hearing.²² Because young person arrested at 14 may be very different in their personality, aspirations and family contexts when finally sentenced at 16 or 17, it is hardly surprising that, if a youth justice system with these levels of delays sees a need for intervention, it should prefer action before rather than after final public hearing. But that makes *messa alla prova* as an intervention difficult to compare directly with any responses in the system in England and Wales: it is neither a good fit for intervention through diversion nor intervention through criminal sanction. In Italy, *messa alla prova* is used for more serious offending where social services assess the individual to have a good prospect of rehabilitation.²³ It can legally be imposed for any crime and magistrates, with very few exceptions, felt that it could, in the right circumstances, be appropriately imposed even for homicide, rape and robbery.²⁴ Its use was regarded as common for drugs offences, certain forms of robbery and racketeering and, in some places, for rape between minors.²⁵ *Messa alla prova* would only be used for minor offences like theft and handling where it was a third or fourth

²⁰ Eight months (one year is the maximum) is the average time spent on a *messa alla prova* programme for those being dealt with for crimes carrying up to 12 years potential prison sentence. One year (three years is the maximum) is the average time spent for those sentenced for crimes carrying higher potential prison sentences.

²¹ D Nelken, *Normalising Time: European integration and court delays in Italy* in *Paradoxes of European Integration*, ed. H. Petersen and others (2008).

²² Int1/TJ, Int2/PTJ. The ‘Int’ coding refers to interviews with further identification based on random numbering and function. TJ refers to a trial judge, PTJ to a pre-trial judge, AP to an Assistant Prosecutor.

²³ *Messa alla prova* is used for around 6% of those brought to court: D Nelken, ‘Italian Juvenile Justice: A lesson in Tolerance?’ in *Comparative Youth Justice*, ed J. Muncie and B. Goldson (2006).

²⁴ Int7/AP. Int8/AP thought homicide and rape were not appropriate crimes for *messa alla prova*. Some prosecutors argued that it should not be used in particular circumstances because of their seriousness: one cited the example of a particular case where organized crime members had been involved in a string of very serious offences including homicide and extortion. But even here there were no absolute prohibitions: it might be appropriate to use *messa alla prova* in relation to some organised crime offences.

²⁵ Int5/TJ, Int3/ChP, Int1/TJ

offence.²⁶ That kind of profile – serious offending or repeat offenders – did not correspond to those given social intervention through diversionary measures in England and Wales at the time. In England and Wales, at the time of the study, response to significant offending would move quite quickly through a reprimand, then a Final Warning and then conviction accompanied by post-conviction intervention.²⁷ Sometimes a Final Warning might lead to a social intervention but where the risk was assessed as low that might well be a single one-off meeting with a social worker. Even where it was higher, this would usually just imply a single further meeting. This is not the kind of substantial extended intervention that is envisaged by *messa alla prova*. So *messa alla prova* had no obvious comparator in England and Wales: its level of intervention matched that of post-conviction sanctions but it did not entail a conviction; its absence of conviction mirrored Final Warnings but its level of intervention was much greater. This reinforces the general impression that diversion was an entrenched feature of one system but not the other. But it made comparison of particular measures problematic.

An even more significant problem of establishing comparable categories relates to the use in Italy of *misure cautelari* (provisional or precautionary measures): a range of pre-trial measures involving increasing degrees of control in the community which were imposed while in theory young people were awaiting trial.²⁸ This might involve the imposition of *prescrizioni*: requirements to engage in study or work activities for a maximum of two months under the direction of social workers. In more serious cases, or where the minor did not respond well, it might involve a requirement to stay at home (*'permanenza in casa'*). This form of 'house arrest' might have qualifications – enabling the young person to leave the house to work or study – or additional limitations preventing communication with certain persons.²⁹ The step beyond that would be to send the young person to a (non-secure) community home (*Comunità di Accoglienza*). Sometimes some of these restrictions might be justified for the same reasons as bail conditions in England and Wales: to prevent flight, further offending or interference with witnesses or

²⁶ Int10/SW.

²⁷ For details see S. Field 'Early Intervention and the 'New' Youth Justice: A Study of Initial Decision-Making' [2008] *Criminal Law Review* 177.

²⁸ 'In theory' because most would never get to trial. The decisions to impose restrictions are made by the Public Prosecutor but then are subject within 48 hours to the confirmation of a pre-trial judge known as the 'judge for preliminary investigations' (*Giudice per le Indagini Preliminari*)

²⁹ S Costarelli, 'Juvenile Justice and Rromani Youths in Italy: The Case of Florence', in *Rromani Youths: The Pathways of Juvenile Justice*, eds A. Patrignani and R. Villé (1997)

evidence.³⁰ But the terms in which they were usually discussed by practitioners in interview were more often couched in terms of responses to established or presumed offending. This looked like reasoning more associated in England and Wales with sentencing decisions at trial than with bail decisions. For example, a Prosecutor described himself as being very willing to use obligations to attend school or become involved in cultural or voluntary work activities as a means of starting the 'route towards rehabilitation' in relation to routine crime in morally and culturally 'deteriorated' social contexts.³¹ A trial judge explicitly talked of the importance of pre-trial restrictions aimed at educating the young person by establishing boundaries.³² Another Prosecutor talked of pre-trial control measures as being important to prevent a sense of 'avoiding responsibility' – a viewpoint that may be understandable if trial is three years away.³³ Choices between different forms of restriction were made in terms of that which would provide the clearest message about the seriousness of the offending.³⁴ Furthermore, subsequent decisions would be conditioned by the response of the young person to these pre-trial measures: a positive response to pre-trial control measures could be used later in proceedings as a way of arguing that no further intervention was required.. Young people might show they had changed and become aware of what they had done while in a community home and thus be given a judicial pardon rather than *messa alla prova* even at the final hearing.³⁵ Conversely the knowledge that the young person had experienced significant pre-trial restrictions on liberty might enable magistrates, in more serious cases to choose *messa alla prova* rather than conviction and custody at the final hearing.³⁶

It was difficult to know what the appropriate comparator for these kinds of interventions might be in England and Wales. Decisions about appropriate pre-trial measures in Italy seem to be part of an ongoing calibration and re-calibration by professional magistrates of the state response to offending in the light of the offence, young person's background and his or her response to state intervention. It seems to be a form of social intervention through the pre-trial criminal justice process that has no direct equivalent in England and Wales where bail decisions

³⁰ Bail Act 1976: schedule 1, part 1.

³¹ Int8/AP

³² Int5/TJ

³³ Int9/AP

³⁴ Int8/AP

³⁵ Int5/TJ, Int2/PTJ

³⁶ Int4/PTJ

are more narrowly focussed on the particular criteria of the Bail Act.³⁷ The formal legal status of the presumption of innocence is no less firmly established in Italy than it is in England and Wales.³⁸ But its practical significance becomes very different in a system where there is no formal guilty plea, where many (perhaps most) young people coming into the system will be informally (partially or wholly) admitting guilt, and where the pre-trial process might well take three years with 80% of young people leaving the system without a conviction.

Close analysis thus revealed the complexities of finding common cross-cultural anchoring points upon which to build close comparison of particular measures of social intervention in the community. It was difficult to construct a meaning of 'diversion' or social intervention 'through' the criminal justice system that had the same validity across two systems in which the significance of pre-trial and trial phases seemed to be transformed by the very different temporal rhythms of criminal justice. The effect of delay in Italy is that surveillance, control and treatment – insofar as those responses occur – are primarily aspects of the pre-trial youth justice system rather than something that is done after formal conviction. In England and Wales in contrast, at the time of our study, delay was seen as rendering state intervention ineffective. Formal criminal justice sanctions were seen as a vital part of reinforcing a sense of personal responsibility and preventing social marginalisation, so speeding up trial processes became a key policy goal.³⁹

Even comparing the use of custody demonstrated difficulties of cultural meaning and categorisation. The few cases that get to trial and end in convictions in Italy usually lead to custody. But then, provided that the custodial sentence is not more than two years, for youths it is very likely to be served part-time (*semidetenzione*) or wholly in the community but subject to the control and supervision of the police (*libertà controllata*). So that looks like something that is in whole or in part a controlling community measure that is going to be listed as a custodial

³⁷ The key criteria under the Bail Act are focussed on enabling an effective trial by preventing flight or interference with witnesses or evidence and preventing further offending *before* trial: Bail Act 1976: schedule 1, part 1. See generally S Thomas, 'Remand Management' in *RHP Companion to Youth Justice*, eds T. Bateman and J. Pitts (2005).

³⁸ The ideological weight of notions of legal due process in Italy (*garantismo*) is significant: it reflects a long-run, strongly established fear of the state's intrusion into the lives of citizens that is particularly marked in Italy (See M Pavarini, 'The new penology and politics in crisis: the Italian case' (1994) 34 *British Journal of Criminology*, 49).

³⁹ Home Office (1997) *No More Excuses* Cmnd. 3809.

sentence. In England and Wales, a custodial sentence almost always means an immediate period of full-time detention.⁴⁰

CIVIL AND CRIMINAL INTERVENTIONS

We had defined our research interests in terms of comparing specifically *criminal* justice interventions. That in part reflected some of the evaluative or prescriptive considerations that fuelled the intellectual curiosity behind the research project. It was intensive and progressive intervention through the *criminal* justice process that was seen as having particularly damaging consequences for young people in terms of labelling stigma and social exclusion.⁴¹ From a British perspective, questions about intervention through civil justice seemed to raise different issues. But, in pursuing the study, we found a further cultural variable: the relationship between civil and criminal justice itself. In England and Wales, civil and criminal jurisdictions in relation to children and young people have been clearly separated since 1989. In Italy, while the two jurisdictions are not unified, youth justice prosecutors combine civil and criminal jurisdiction and judges will often occupy dual roles. This has an impact on the cultural significance of social intervention through the criminal process.

In England and Wales, since the Children Act 1989, the Family proceedings courts exercise jurisdiction over local authorities' civil powers of supervision and control over young people (for example if the child is not receiving reasonable parental care or is beyond parental control).⁴² The primary statutory aim of intervention is to address the interests and welfare needs of the children and young persons. Separate Youth courts now exercise an exclusively criminal jurisdiction with a statutory primary objective of preventing offending behaviour: engagement with welfare needs is defined as a means to that aim.⁴³ This creates a very clear institutional division between criminal and civil intervention.⁴⁴ In contrast,

⁴⁰ At the time this would usually involve a detention and training order in a Young Offenders' Institution, a Secure Training Centre or a Secure Training Home: for details see C Ball *et al.*, *Young Offenders: Law, Policy and Practice* (2001, 2nd edn.)

⁴¹ Pitts, *op.cit.*, n 12

⁴² The former gives the Local Authority parental responsibility and it may place the child away from home while the latter leaves the child at home but enables the LA to supervise them (Children Act 1989: S31).

⁴³ Though concern for welfare retains an independent statutory basis under the Children and Young Persons Act 1933: S44.

⁴⁴ In practice, during the period of research, Youth Offending Teams – the social workers working with the Youth Courts – felt that they were left to deal with many welfare issues because they had better funding than the youth social services working within the civil jurisdiction: see Field (2007) *op.cit.*

the institutional lines are less clearly drawn in Italy. It is not just that Youth justice magistrates may work across civil, administrative and criminal jurisdictions with judges being transferred between civil and criminal posts during their career: prosecutors actually have jurisdiction over both civil and criminal matters in the same case.⁴⁵ Thus they can define an event as non-criminal but order that state intervention take place through social work supervision or control through the civil courts. Indeed often civil intervention will be quicker than waiting to put a *messa alla prova* in place because that would require waiting until the preliminary hearing (which might be a year away). Furthermore, Italian pre-trial judges can ensure civil interventions are taking place alongside preliminary criminal investigations. In responding to our vignettes in interviews, the difference in response that was noticeable was not so much that Italian magistrates would be more likely than Welsh police, prosecutors or magistrates to issue bare reprimands or pardons⁴⁶ (though there were situations where that was true). Rather it was that where Italian judges saw problems - in the family background for example - the range of envisaged solutions included civil intervention.⁴⁷ Indeed, civil intervention was not seen simply as an alternative to criminal proceedings: the two were seen as potentially working alongside each other. Thus in a *vignette* involving the young person selling the mother's drugs where there were serious family problems alongside drug and alcohol consumption and truancy, an Assistant Prosecutor envisaged proceeding with the criminal prosecution (*rinvio a giudizio*) while at the same time launching civil proceedings.⁴⁸ The Prosecutor did this anticipating that she might drop the criminal prosecution at the end of the day. The civil proceedings were seen as providing a complementary means of monitoring the young person's development.⁴⁹

We need to bear in mind the practical constraints here on social intervention. Italian magistrates in interview stressed the limited number of both judicial and local authority social workers available to them.⁵⁰

⁴⁵ Proposals to separate more clearly civil and penal juvenile courts have not been adopted: thus the same judges may be acting in both civil and criminal roles : Int1/TJ, Int3/PTJ, Int4/PTJ, Int5/TJ, Int7/AP, Int9/AP.

⁴⁶ There are two main means for doing this. *Irrelevanza del fatto* is a measure whereby proceedings can be dropped for insufficient evidence or (more often) because the offence is insufficiently serious to warrant conviction). *Perdono giudiziale* (judicial pardon) is a formal penalty issued by a court (at the preliminary hearing or final hearing). It leaves a criminal record until 21 but nothing more: no fine to be paid nor any social intervention.

⁴⁷ [Int7/AP].

⁴⁸ Int7/AP.

⁴⁹ Int8/AP.

⁵⁰ Int4/PTJ, Int5/TJ

Gatti and Verde have argued sharp variations in trends in reporting offences to prosecutors are likely to be linked to the availability of non-criminal disposals such as social service welfare interventions by local authorities.⁵¹ But judges saw intervention through civil proceedings in less serious cases either as an alternative to or something that might happen alongside a criminal case.⁵² Indeed such powers were the only option for children under 14 given that the age of penal responsibility in Italy starts at 14.⁵³

Thus, in trying to compare particular elements of intervention in the youth justice process, there are two linked potential difficulties: first, that the elements may not 'map' onto each other and the second, that the significance of each element to the overall system may be determined by its culturally distinct institutional contexts. Here, the meaning of different forms of social intervention through or around criminal justice is profoundly influenced by different ways of seeing the relationship between civil and criminal proceedings and the pre-trial and trial processes. This points to a challenge in adopting conventional social science approaches to comparison in criminal justice systems: the elements available for potential analysis and control may, on close examination, not be comparable. It may be difficult to find valid cross-cultural anchoring points in cross-cultural research which will enable the construction of dependent and independent variables. For us, the contrast underpinning our research question between diversion and social intervention through criminal process in the community required a cross-culturally valid way of distinguishing between diversion and intervention 'through' criminal process. When closely examined within the context of the broader systems of which they are part, *messa alla prova*, *misure cautelari* and the blending of civil and criminal intervention did not seem to relate to our distinctions in the same way as the institutional mechanisms in England and Wales.

YOUTH JUSTICE AS LEGAL CULTURE: TOWARDS HOLISTIC INTERPRETATIONS

⁵¹ Gatti and Verde, *op. cit.* (2002), pp. 307-8.

⁵² Int3/ChP, Int8/AP, Int9/AP

⁵³ In contrast, with the implementation of the Crime and Disorder Act 1998, young people in England and Wales could be convicted of crimes from the age of 10 provided only that the courts are satisfied that they have the relevant mental element at the time of the offence

Another way of approaching comparative study in criminal justice is to regard its primary purpose as interpretive, as seeking to understand how legal actors come to think, feel and act as they do, and, to see the comparative understanding of difference and similarity in the light of that primary interpretive task. This is an approach often associated with comparing legal cultures.⁵⁴ It implies a pervasive concern for how meaning is constructed and an emphasis on rendering explicit ways of seeing, thinking and acting that actors on the ground may take for granted. Indeed, the capacity of an outsider to see what an insider takes for granted is perhaps the most valuable consequence of comparative analysis. Our empirical materials - summaries of case-files and semi-structured interviews - became a means to examine how cases and outcomes were differently constructed and categorised by actors on the ground.⁵⁵ Integrating this with comparative analysis of legal and policy frameworks and broader social discourses around concepts like state, family, youth and crime, we were able to develop a rich description of the interplay between a range of cultural elements which reinforced the tendency towards intervention through criminal justice and conviction in England and Wales and away from it in Italy.⁵⁶ It is important to emphasize this bringing together of a range of elements. Raymond Williams, a foremost pioneer of cultural analysis from the 1950s, described the theory of culture as 'the study of relationships between elements in a whole way of life. The analysis of culture is the attempt to discover the nature of the organization which is the complex of these relationships.'⁵⁷ More specifically, Webber has argued that the distinctive contribution of *legal* culture is 'to focus on how diverse phenomena are interrelated, how they form an integrated whole, interdependent and mutually reinforcing'.⁵⁸ In previous work I have analysed these interdependent elements of youth justice cultures in terms of a schema of distinct cultural elements derived from Williams: intellectual formations, institutions, structures of feelings and traditions.⁵⁹ Thus the political contexts, legal policy formations, distinct institutional interrelations between magistrates, police and social workers, between civil and

⁵⁴ See D Nelken, *op.cit* (2010) *chapter 3* for an examination of legal cultures and interpretation as a purpose in comparative analysis.

⁵⁵ For analysis of how files and cases and their categories may be actively constructed in legal process, see A Cicourel, *Social Organization of Juvenile Justice* (1968) and D Nelken, *Limits of the Legal Process* (183)

⁵⁶ For details see Field and Nelken (2007, 2010), *op.cit.* and Field (2010) *op.cit.*

⁵⁷ R Williams, *The Long Revolution* (1961) at 63.

⁵⁸ J Webber 'Culture, Legal Culture and Legal Reasoning: a Comment on Nelken' (2004) 29 *Australian Journal of Legal Philosophy* 27 at 28.

⁵⁹ S Field, *op.cit.* (2010)

criminal jurisdiction and trial and pre-trial phases, could be analysed alongside broader social traditions and informal structures of feeling to explain the different meanings of intervention through criminal process in youth justice in the two jurisdictions. In this way we could explain how the different aspects of these criminal justice legal culture 'resonate and fit together'.⁶⁰ We were able to weave analysis of the professional ideologies of the Italian specialist professional youth justice magistrate and her supporting experts alongside consideration of her hierarchical powers of independent direction and control of the pre-trial process within the remains of the Italian inquisitorial tradition. We were able to place this within the broader contexts of civil society such as the family, religion and mass media. Interviews revealed that, in Italy, subject to only specific exceptions for immigrants, Gypsies and organized crime families, limited state intervention was underpinned by a general trust amongst youth justice practitioners for the Italian family and the strong informal social controls it exercised.⁶¹ The local Italian interpretation Catholicism is associated with *de facto* tolerance of wrongdoing where it is not associated with challenges to political or religious authority.⁶² The lack of a national tabloid press engaged in a fierce battle to preserve mass circulations combines with a concern for street crime that has been framed in terms of the challenges to Italian society of mass immigration rather than the loss of moral discipline amongst the working classes more generally.⁶³

We contrasted these interrelated elements with the very different relationships in England and Wales. These differences encompassed but went beyond differences in institutional relationships. We have noted the significance of the high degree of autonomy enjoyed by professional Italian magistrates who had chosen to work with young people and their hierarchical dominance of other actors within the system. We contrasted

⁶⁰ D Nelken 'The Uses of Legal Culture' (2004) 29 *Australian Journal of Legal Philosophy* 1 at 9.

⁶¹ See Field and Nelken 2010, *op.cit.*, n. 4 for views from the case-files and Int9/AP and Int10/SW for interviews.

⁶² D Melossi, 'Translating social control: reflections on the comparison of Italian and North American cultures concerning social control, with a few consequences for a "critical" criminology' in *Social Dynamics of Crime and Control*, eds S. Karstedt and D. Kai (2000) 150 and 'The Cultural Embeddedness of Social Control: Reflections on the Comparison of Italian and Northern American Cultures Concerning Punishment' (2001) 5 *Theoretical Criminology* 403.

⁶³ On the Italian media see R Lumley, Peculiarities of the Italian Newspaper, in *Italian Cultural Studies: an Introduction*, eds D. Forgacs and R. Lumley (1996), C Wagstaff The Media in *Cambridge Companion to Modern Italian Culture*, edited by Z. Baranski and R. West (2001). On Italian attitudes towards street crime as a problem see Field and Nelken (2010), *op. cit.*, 300

this political independence with the more pervasive influence of central government on the youth system in England and Wales using the techniques of new public management (essentially unknown in Italian youth justice). We also charted the way in which relationships between social workers, police and lay magistrates in England and Wales were much more negotiated than those in Italy (where the professional magistrate had clear power to direct police and social workers). But beyond these immediate institutional relationships we charted very different influences from civil society particularly very different attitudes to families and the influence of a tabloid press. In our interviews with Youth Justice Magistrates in Wales, they were more likely to see dysfunctional families as the characteristic background for those that appeared before them and to associate this with a loss of social authority and broader informal social controls within poor working-class communities. With wider distrust of families came a greater belief in the inevitability of greater recourse to state intervention. And behind this were images of a community - to whom local lay magistrates saw themselves as being in some sense responsible - whose presumed punitiveness was framed by the emotional images of the British tabloid press.

Through these multiple and various layers of interpretation, we were able to set out the complex processes by which diversion made sense in an Italian setting in a way it did not in England and Wales.⁶⁴ But what constraints follow from such a holistic interpretive approach to explaining difference?

FROM INTERPRETATION TO EVALUATION AND PRESCRIPTION?

What are the implications of doing this kind of research for making cross cultural value judgements about what is good and bad? One of the consequences of an interpretive research strategy is that the researcher invests an enormous amount of time and effort in understanding why and how actors think and act as they do, in asking how this works in its own terms. In the end we came to explain contrasting outcomes in terms of the 'fit' between diversion in Italy, formal intervention in England and Wales and a wide range of cultural elements in each jurisdiction. In turn, the difficulty that that creates is that, in building these complex accounts of a certain 'cultural logic', many external cross-cultural judgements begin to feel 'wrong' or 'superficial': they do not seem to acknowledge the way

⁶⁴ For a clearer flavour of these layers of interpretation see Field and Nelken (2007), (2010) and Field (2012), *op. cit.* n 4

that outcomes are culturally accomplished, the range of cultural influences making one outcome likely and another unlikely. Thus judgements which pitted a 'punitive' system in England and Wales against an Italian system based on 'benevolent tolerance'⁶⁵ began to feel superficial because they underplayed the extent to which social intervention in criminal process is conditioned by how far it is written into institutionalized relationships. The system in Italy simply does not give you effective options for social intervention after conviction and it provides opportunities for social intervention without conviction that do not exist in England and Wales. These institutional relationships are not simply a consequence of a benevolent commitment to tolerance or leniency. They are in part the product of aspects of Italian justice that might not draw approval from external commentators such as very long trial delays, a consequent willingness to begin responding to presumed offending in the pre-trial process before conviction and a blurring of relations between civil and criminal intervention. Some of these would be widely thought undesirable in England and Wales and others, such as the appropriate relationship between civil and criminal jurisdictions, subject to ongoing debate.⁶⁶ The argument for a clear division in England and Wales has stemmed from a certain mistrust of the state and a fear that confusion of punishment and welfare might lead to apparently paternalist welfare interventions that are a cloak for controlling or coercive interventions.⁶⁷ Even the absence of a dominant figure like the Italian pre-trial youth justice magistrate is not an accident in England and Wales. The coordinate structure of lay magistrate, police and social workers in England and Wales is characteristic of a tradition in criminal justice amongst Anglo-saxon liberal adversarial jurisdictions.⁶⁸ The absence of clear hierarchical relationships reflects the historic desire to divide and contain power and, once again, that distrust of the state. So these institutional relationships reflect enduring elements of (or debates within) British political culture and history. This is not to say that no British commentator could possibly wish to move in these directions but that they raise issues around legal accountability for the use of control and coercion that are matters of political culture, of values and choices to

⁶⁵ J Muncie and B Goldson 'States of Transition: Convergence and Diversity in International Youth Justice' in *Comparative Youth Justice* eds. J Muncie and B Goldson B (2006) Sage Publications 197 at 209, 214. For a critique of the categorisation of Italy as tolerant or lenient, see D Nelken 'Italy: A lesson in tolerance?' in eds J Muncie and B Goldson, *Comparative Youth Justice: Critical Issues* (2006) and D Nelken 'Italian Juvenile Justice: Tolerance, Leniency or Indulgence?' (2006) 6 *Youth Justice* 107.

⁶⁶ J Fionda, *Devils and Angels: Youth Policy and Crime* (2005) 116-120.

⁶⁷ R Smith, *Doing Justice to Young People* (2011) 112-114.

⁶⁸ M Damaska, *The Faces of Justice and State Authority* (1986).

which different societies may ultimately respond differently. The danger is that, without investing in close analysis of the cultural underpinnings of Italian youth justice, that British commentators may see desired outcomes very clearly but not quite all the contexts in which they are achieved.⁶⁹

What are the broader implications for policy prescription? How might this kind of comparative research help us to decide what is good or bad in youth justice? A fundamental value judgement underpins youth justice policy across diverse jurisdictions. How should we blend two distinct but related social objectives?⁷⁰ First, there is the promoting of social integration (or the limiting of social exclusion) of children and young people. Secondly there is the preventing or reducing of youth crime. The distinction can be captured by two phrases: 'children first, offenders second' (which puts the accent on the first social objective and sees the second as flowing from that) and 'governing through crime' (where responding to crime becomes the dominant way of defining issues of social order).⁷¹ In essence these are fundamental political choices that turn on much broader questions than youth justice. What kind of society do we want? What kind of people are we? Comparative research can certainly illustrate the range of possible blends. But choosing between them seems to be as much about politics and identity as policy. Except insofar as the choice of blend may be shaped by a consequent question: how can you blend those two social objectives most effectively and efficiently? What works?

If the relevant question becomes what works as a way of blending social integration with crime prevention or reduction, how can the kind of interpretive comparative research that we have conducted help us to 'learn from elsewhere'? Our research strategy emphasized the interpretation of meaning by actors. We explained and constructed the meaning of youth justice in our two jurisdictions in terms of a range of cultural elements (institutions, traditions and ways of thinking that embraced both complex intellectual formations and more improvised

⁶⁹ See D Nelken, 'Foil comparisons or foiled comparisons? Learning from Italian juvenile justice' *European Journal of Criminology* (2015) 12 519 for a response to advocacy of Italian youth justice by the Howard League of Penal Reform.

⁷⁰ 'Blend' here refers to both prioritization and interrelationships.

⁷¹ The phrase 'Children First, Offenders Second' was originally associated with the All Wales Youth Offending Strategy' a joint document produced by the Youth Justice Board and the Welsh Assembly Government. The phrase is used to characterise the approach set out by Kevin Haines and Stephen Case for example in their book *Positive Youth Justice: Children First, Offenders Second* (2015). The term 'governing through crime' is associated with the book by J Simon *Governing through Crime* (2007)

structures of feeling). The focus was on making connections between a range of elements rather than isolating or controlling them as variables. Hence we have a potential problem. We can show how and why penal non-intervention fitted 'youth justice culture' in Italy. We can also set out a set of interrelationships which seemed to make it culturally possible, indeed perhaps logical, to avoid intervention, which gave cultural coherence to non-intervention as a response. But what does this tell us about its fit with other mixes of institutions, intellectual formation, structures of feeling and traditions? We have been able to produce plausible answers to the 'how' and 'why' questions in a particular cultural context but does this enable us to answer 'what if' questions? What if you transfer this or that element into a different cultural context?

If one was looking to transplant criminal justice ideas from one place to another, formally constructed policies, procedures and institutions look like the most plausible bet. Transposing elements of the broader cultures of civil society – such as the Italian family – does not look like a viable policy option. Even transposing the institutions of civil society such as the mass media is not realistically within the power of most states interested in using comparative research to guide policy change. But even looking at institutional elements of criminal justice culture, this article has illustrated the problems of isolating particular elements to transfer (assuming you cannot transplant the whole system). Our research did not enable us to isolate the causal impact of particular cultural elements exactly because it explained outcomes in terms of their interrelations. If you take a cultural element out of its context how will that change its effect? If we say that we are trying to specify the cultural 'conditions of existence' of the non-interventionist practices identified in Italian youth justice, then they seem not just multiple but inextricably interrelated such that understanding those conditions of existence may not permit us to isolate elements and their causal influence from the interrelationships of the whole. To put it in the language of quantitative research, it is not clear that one can isolate and control independent variables to examine their impact on a dependent variable.

To those British observers thinking about institutional borrowings from Italy, one possible candidate might be career professional Italian judges and prosecutors who have chosen to work with young people, supported by child experts at hearings and a civil and criminal jurisdiction that is to some extent overlapping.⁷² But how would such actors have

⁷² For suggestions from British commentators that the separation of civil and criminal jurisdictions may be unhelpful, see J Fionda, *Devils and Angels: Youth Policy and Crime*

operated in the very different system of diversionary and penal mechanisms introduced by the 'new' youth justice? How would they relate to British families and work under the spotlight of the British media? It may be that the outcomes might be deemed positive by at least some observers but they would be very difficult to predict even on the basis of a very close observation of Italian youth justice culture. They might work, but they surely would not work in the same way.

There is a well-known game called 'Jenga' in which one sets up a tower of wooden blocks and then tries to remove particular blocks without the tower itself falling. The game is about discovering which parts are essential to the integrity of the whole structure and which are not. In deciding whether (and how) to transplant particular institutional mechanisms from one criminal justice culture context to another, we are faced with an analogous challenge: we want to know what elements of the system under observation are dependent on what other elements to function effectively. Research based on comparative cultural interpretation, such as ours, does not easily allow such questions to be addressed exactly because the explanatory analysis depends on the interplay of cultural elements. But some hints may be found. For example, the distinctive institutional elements of Italian youth culture (its specialist youth justice magistrates, its mixed civil and criminal jurisdiction and its articulation of a particular kind of division of responsibility between family and state) is not sufficient to promote diversionary outcomes in certain circumstances. The children of immigrants, of Gypsies and of organised crime families are rarely beneficiaries of benevolent tolerance or even diversionary support. They are sent to prison in high and disproportionate numbers.⁷³ Assumptions about the family of the offender – and in particular the capacity of the state to trust the family to socialise young people effectively – are essential to the diversionary orientation of the Italian system. If you pull that block out, the Jenga pile collapses. Changes over time can also give some hints of essential conditions of existence of particular youth justice cultures. For example, the 'new' youth justice culture of progressive intervention in England and Wales which appeared so solid over the period of our research did not survive the removal of three elements: the remodelling of central government targets, the loss of political visibility of

(2005) 120 and the Keynote speech by Kay LJ at Children Law UK Conference 'Welfare and Justice' (2003). Copy with the author.

⁷³ Gatti and Verdi *op.cit.* (2016) at 19-20

youth crime and a financial crisis in the means of state intervention.⁷⁴ Together these elements brought a changed relationship between the politics and the administration of youth justice. Youth crime and youth justice became less salient to central government policy. Greater independence of the administrative regulator (the Youth Justice Board) from direct political pressures enabled local diversionary initiatives to be encouraged. A degree of independence and agency was returned to social workers, many of whom had always retained doubts about the stigmatizing effects of formal progressive intervention through the criminal justice process based on early and systematic conviction and sentence.⁷⁵ The combined effect has been to promote the rise of diversion, informal voluntary interventions without conviction and dramatic falls in formal convictions and custody rates.⁷⁶ A relatively low key shift in political culture in England and Wales starting around 2007/8 has resulted in a major shift in youth justice culture. This would not have been easily predictable from our interpretation of the interrelated culture which seemed to reinforce the trend to formal intervention. This reinforces the point made earlier: our kind of holistic analysis of cultures could make sense of the choices made within the system for formal intervention. But it could not easily predict what would happen if particular elements shifted or were replaced.

TOWARDS CONCLUSIONS

This account of a single empirical study based on bilateral comparison prompts certain reflections on different ways of doing comparative research and the relationship between explanation and policy prescription. I started with the argument that traditional social scientific approaches to cross-cultural analysis – if they can establish ‘scientific’ propositions about the variables that affect ‘what works’ in criminal justice – seem to offer a direct and clear route from comparative explanation to transnational prescription. But the evidence of this study suggests the challenges of doing the kind of research that might offer such straightforward policy prescriptions. It is rare for policy-makers to want to transpose an entire criminal justice system; they prefer to introduce only limited elements

⁷⁴ R Smith ‘Reinventing Diversion’ (2014) 14 *Youth Justice* 109, T Bateman, ‘Trends in detected Youth Crime and Contemporary State Responses’ in *Youth Crime and Justice* ed B Goldson and J Muncie (2015, 2dn.)

⁷⁵ S Field (2007), *op.cit.*, n 6

⁷⁶ T Bateman, *The State of Youth Justice in 2017* (2017) 35-40, R Smith (2014), *op.cit.*, n 74, K Haines and S Case ‘The Future of Youth Justice’ (2018) 18 *Youth Justice* 131

from elsewhere. Ideally, they want to be able to predict the effects of these elements in their new setting by isolating their impact from other variables in the original context. That becomes difficult if the element to be transposed – a legal actor or a penal measure for example – only has meaning (or has a very particular meaning) within the broader criminal justice culture within which it is anchored. One problem of borrowing from elsewhere is that some of these cultural contexts may not be obvious to the external eye. It may require close attention to cultural interpretation to reveal hidden difficulties in establishing cross-cultural common denominators of meaning. For a criminal justice researcher trained in England and Wales, only close reading of many transcripts of interviews and summaries of practitioner reasoning in case-files has revealed the distinctive ways in which Italian youth justice constructs its categories and draws its lines. Measures that initially look as if they might have direct comparators in one's own jurisdiction – such as *misura cautelari* or *messa alla prova* – may look very different as one begins to grasp cultural contexts such as the relations between the pre-trial and trial phases and between civil and criminal jurisdictions.

My argument is not that interpretive studies are a preferable form of comparative research to more traditional positivist explanations. Rather that interpretation should be seen as a kind of master-purpose for cross-cultural research – where lack of cultural familiarity is a more frequent problem – upon which all explanation must depend. The key initial problem, in terms of conventional social science methods, is how to define the categories of data to be collected. Making these kinds of decisions is difficult unless we already have a good interpretive understanding of the places being compared.⁷⁷

This creates some tensions. It is not just that good interpretive research may sometimes reveal that apparently similar comparators are in fact not so suitable for traditional analysis. The broader demands of the two kinds of analysis may be in tension with each other. A wide range of sites may be important to studies where one is seeking to exploit natural variation across a number of cases to explore causal variables. Yet interpretive explanation depends on the researcher having or developing a cultural and linguistic fluency in the investigated locations. That tends to limit the range of possible research sites. The alternative, a large research team with diverse cultural and linguistic backgrounds raises other problems of achieving common understandings.⁷⁸ Furthermore, for these

⁷⁷ D Nelken, *op.cit.* (2010) (chapter 2). n. 1

⁷⁸ See Edwards' account in this volume of his use of the Delphi method to seek common cross-cultural understandings from a diverse range of participants.

more conventional comparisons of variable elements, the question of commensurability across comparators may become a limiting factor: there may need to be a certain amount of cultural proximity between the systems under comparison. Our difficulties in finding matching elements may have been less acute if we had studied places that were more similar. For example, youth justice in Wales might be – and sometimes is – compared with Northumbria to try to achieve a closer mix of cultural elements. One can imagine a different kind of quantitative study comparing parts of Italy. But that in turn loses some of the potential for innovative thinking that flows from ‘learning from elsewhere’

What is the use then of more radical comparisons based on building interpretative understandings of very different places such as the one conducted in this bilateral study?⁷⁹ Here, the link between policy formation and comparative work may need to be seen in more indirect ways, as contributing to the range of possibilities that might be considered rather than demonstrating evidence of workable efficacy that can be transferred to different cultural contexts. If policy-makers are seeking the kind of certainty associated with a randomized controlled trial, comparative research is rarely going to give you anything like that unless the comparators are within the same jurisdiction or are jurisdictions that are remarkably close in most particulars. But that in turn loses some of the eye-opening surprise that comes with studying the ‘other’.

⁷⁹ David Nelken describes these as ‘foil’ comparisons: Nelken, *op.cit.*, (2015) n. 69